

# **EDMONDS CITY COUNCIL APPROVED MINUTES**

## **August 28, 2012**

The Edmonds City Council meeting was called to order at 6:00 p.m. by Mayor Earling in the Council Chambers, 250 5<sup>th</sup> Avenue North, Edmonds.

### **ELECTED OFFICIALS PRESENT**

Dave Earling, Mayor  
Strom Peterson, Council President  
Frank Yamamoto, Councilmember  
Joan Bloom, Councilmember  
Kristiana Johnson, Councilmember  
Lora Petso, Councilmember  
Adrienne Fraley-Monillas, Councilmember  
Diane Buckshnis, Councilmember

### **STAFF PRESENT**

Phil Williams, Public Works Director  
Shawn Hunstock, Finance Director  
Carrie Hite, Parks & Recreation Director  
Rob Chave, Planning Manager  
Leonard Yarberry, Building Official  
Rob English, City Engineer  
Pamela Lemcke, Capital Projects Manager  
Jeff Taraday, City Attorney  
Sandy Chase, City Clerk  
Jana Spellman, Senior Executive Council Asst.  
Jeannie Dines, Recorder

### **1. CONVENE IN EXECUTIVE SESSION REGARDING POTENTIAL LITIGATION PER RCW 42.30.110(1)(i).**

At 6:00 p.m., Mayor Earling announced that the City Council would meet in executive session regarding potential litigation per RCW 42.30.110(1)(i). He stated that the executive session was scheduled to last approximately 75 minutes and would be held in the Jury Meeting Room, located in the Public Safety Complex. No action was anticipated to occur as a result of meeting in executive session. Elected officials present at the executive session were: Mayor Earling, and Councilmembers Yamamoto, Johnson, Fraley-Monillas, Buckshnis, Peterson, Petso and Bloom. Others present were City Attorney Jeff Taraday, Public Works Director Phil Williams, Parks & Recreation Director Carrie Hite, Finance Director Shawn Hunstock, and City Clerk Sandy Chase. The executive session concluded at 7:15 p.m.

Mayor Earling reconvened the regular City Council meeting at 7:20 p.m. and led the flag salute.

### **2. APPROVAL OF AGENDA**

**COUNCIL PRESIDENT PETERSON MOVED, SECONDED BY COUNCILMEMBER BUCKSHNIS, TO APPROVE THE AGENDA IN CONTENT AND ORDER. MOTION CARRIED (6-0). (Councilmember Johnson was not present for the vote.)**

### **3. APPROVAL OF CONSENT AGENDA ITEMS**

**COUNCILMEMBER BUCKSHNIS MOVED, SECONDED BY COUNCIL PRESIDENT PETERSON, TO APPROVE THE CONSENT AGENDA. MOTION CARRIED (6-0). (Councilmember Johnson was not present for the vote.) The agenda items approved are as follows:**

**A. ROLL CALL**

**B. APPROVAL OF CITY COUNCIL MEETING MINUTES OF AUGUST 21, 2012.**

**C. APPROVAL OF CLAIM CHECKS #133824 THROUGH #133952 DATED AUGUST 23, 2012 FOR \$638,586.89.**

**4. AUDIENCE COMMENTS**

**Alvin Rutledge, Edmonds**, displayed a photograph of a car boat. He referred to the ordinance that prohibits motorboats on Lake Ballinger and suggested the City consider revising the ordinance to allow an event that would showcase car boats and the Fire Department's rescue equipment and training.

**Roger Hertrich, Edmonds**, asked why copies of the June 5, 2007 minutes were available on the public information table in Council Chambers. Next, he referred to chip sealing done by the cities of Mountlake Terrace and Shoreline, citing specific projects in Shoreline on 10<sup>th</sup> Avenue NE, 15<sup>th</sup> Avenue NE and NE 175<sup>th</sup> Street. He suggested 5<sup>th</sup> Avenue be the first road considered for chip sealing in Edmonds as it is scheduled for an overlay. Because chip sealing is less expensive than an overlay, it would free up money to chip seal other roads. He suggested the Council contact Shoreline to determine how much money Edmonds could save by chip sealing rather than overlays.

**5. REPORT ON BIDS OPENED AUGUST 27, 2012 FOR THE MAIN STREET DECORATIVE LIGHTING AND SIDEWALK ENHANCEMENTS PROJECT (5TH AVE TO 6TH AVE) AND POSSIBLE AWARD OF A CONSTRUCTION CONTRACT.**

City Engineer Rob English reported this is the second time this project has been bid; the first bids were rejected due to problems with documentation provided by the bidders related to the Disadvantaged Business Enterprise program. The project was re-advertised and the City received four bids. The low bid was provided by Interwest Construction; their bid amount was \$1,092,552. The engineer's estimate was \$1,084,553. In the first round of bids opened on August 7, the lowest bid was \$1,179,015. Interwest Construction's bid is \$87,000 lower than the lowest bid in the first round of bids.

Mr. English reviewed the scope of the project, displaying several photographs illustrating the existing condition of the sidewalks:

- 12-foot sidewalks
- 16 LED Sternberg street lights
- 18 street trees
- Raised mid-block pedestrian crossing
- Relocation of overhead electrical utility service (currently on the south side of the street, will be relocated to the south alley)
- Street pavement reconstruction
- Waterline replacement (existing is 1920s cast iron)
- Stormwater improvements
- 4 artistic flower poles
- Street furniture (bike rack, solid waste receptacles and benches)

Mr. English reviewed the construction budget:

<b>Element</b>	<b>Amount</b>
Construction contract	\$1,092,553
Construction management	185,800
Contingency 10%	109,300
Street lights	49,500
Art	8,000
Miscellaneous	5,500
Public art (1% of stormwater)	1,700
Total	\$1,452,353

Mr. English reviewed funding sources:

Source	Amount
Federal grant	\$ 596,000
State grant	477,867
Water Utility	181,305
Storm Utility	197,181
Total	\$1,452,353

Mr. English introduced Interwest Construction Owner Eban Twaddle (360-757-7574) and Project Manager Andy Conner (360-757-7574) and the City's Project Manager Pam Lemcke (425-771-0220 x1329).

Mr. English reported a meeting is scheduled with downtown businesses in this corridor on Tuesday, September 4 at 8:30 a.m. in the Brackett Room in City Hall where Interwest Construction, City staff and the consultant management team will review the schedule and answer questions. There will also be a meeting with the Downtown Edmonds Merchant's Association (DEMA) on September 7 to provide an update on the project. The goal is for construction to begin on September 10. Main Street will be closed between 5<sup>th</sup> & 6<sup>th</sup> during construction; a 5-foot sidewalk width will remain open to provide access to businesses. The contract is structured so that the project is completed by mid-November.

WSDOT concurs with the contract award, particularly the DBE participation. Staff recommends award of the project to Interwest Construction in the amount of \$1,092,552.65.

Mayor Earling pointed out the high quality work staff has done leading up to this point including 4-5 meetings with the business community. Everyone is satisfied with the communication and he was pleased Interwest would be constructing the project. He relayed that several staff members have worked with Interwest in the past.

For Councilmember Petso, Mr. English stated the engineer's estimate was \$1,084,553 and the prior low bid amount was \$1,179,015.

Councilmember Buckshnis asked Mr. English to identify where construction would occur. Mr. English answered the east boundary is approximately 50 feet east of the intersection of 6<sup>th</sup> Avenue and will include intersection improvements at 6<sup>th</sup> & Main (reconstruction of each corner with curb returns, ramps and pedestrian crossings); the west boundary is just short of the intersection of 5<sup>th</sup> & Main.

Councilmember Buckshnis inquired about the \$8,000 for art. Mr. English explained that is for the four artistic flower poles. The \$8,000 covers the cost of the art element and fabrication. The cost is reimbursed by the federal Transportation Enhancement grant.

**COUNCILMEMBER YAMAMOTO MOVED, SECONDED BY COUNCILMEMBER BUCKSHNIS, TO AWARD THE MAIN STREET DECORATIVE LIGHTING AND SIDEWALK ENHANCEMENTS PROJECT (5TH AVE TO 6TH AVE) CONTRACT TO INTERWEST CONSTRUCTION, INC. IN THE AMOUNT OF \$1,092,552.65. MOTION CARRIED UNANIMOUSLY.**

## **6. PERMITTING FEES FOR SOLAR INSTALLATIONS**

Building Official Leonard Yarberry relayed staff was asked to describe how fees for solar installations are calculated so that the Council could consider potentially reducing or waiving fees for certain projects. This item was presented to the Planning, Parks and Public Works Committee on August 14 and referred to full Council for discussion.

Mr. Yarberry explained there have been three residential solar projects and one commercial solar project (phase 1 of the installation on the Frances Anderson Center). Following the Frances Anderson Center project and applications for residential projects, staff began researching how permitting fees for solar projects were established by other jurisdictions. There is currently no specific fee for solar permits in the City's adopted fee schedule. In accordance with City policy regarding establishing fees, a fee was calculated based on staff time and determined to be two hours; one hour for plan review and permit processing and one hour for inspection. The total permit fee for a residential solar project is \$135. For the Frances Anderson Center project, the standard valuation format was utilized; the fee for that project was approximately \$13,000. Since then a policy was adopted that is consistent with other jurisdictions (Portland and San Jose) where the valuation does not include the cost of the solar panels and inverters. Based on information provided by Steve Bernheim regarding phase 2 of the Frances Anderson Center project, using the new valuation methodology, the permit fee would be \$621.

Mr. Yarberry explained the above valuation methodology is consistent with a guide for local governments published by the U.S. Department of Energy (DOE), "Solar Power in Your Community." DOE recommends a fee of \$300 or less for most residential systems and Solar America Board for Codes and Standard recommends fees of \$75-\$200 for a system up to 4 kilowatts. The fee Edmonds currently charges is within those ranges.

The question before the Council is whether to continue with the current fees or to reduce or waive fees for certain projects. One option would be a reduction or elimination of fees for solar projects as an incentive to be consistent with the Sustainability Element of the City's Comprehensive Plan.

Edmonds is a participant in a Department of Energy grant project, the Evergreen State Solar Partnership (ESSP) along with Bellevue, Seattle, and Ellensburg as well as Puget Sound Energy, Snohomish PUD, City of Ellensburg and Seattle City Light. ESSP is examining ways of standardizing and minimizing costs for solar energy projects statewide.

Councilmember Johnson relayed it appeared that the residential fee considers the time for plan review and inspection to develop a fee. Recognizing the City has little experience with commercial solar projects, she asked whether staff could calculate the amount of staff time for plan review and inspection for the Frances Anderson Center solar project. Mr. Yarberry answered residential solar installations projects are similar and are typically not very large; conversely the size of a commercial project could be extremely variable depending on the roof structure, number of panels, type of installation, etc. It would be difficult to establish a single fee for a commercial solar installation; it is possible a sliding fee schedule could be developed for commercial installations based on size and kilowatts. He relayed some jurisdictions such as Seattle established a low threshold for small residential projects that do not require a permit.

Councilmember Fraley-Monillas relayed an email from Steve Bernheim expressing Sustainable Edmonds' and his personal support for the way solar permitting fees are being handled by the Planning Department. They generally support lowering commercial and residential fees for solar energy projects (and/or all renewable energy projects in Edmonds) in a way that values the project fairly and results in a fair fee so that fees do not become a disincentive to the project. The Planning Department has acted very reasonably in its revised valuation approach to commercial installations and its reasonable flat fee approach to residential installations. They also support the anticipated success of the ongoing statewide ESSP fee-standardizing efforts. They also acknowledge that everyone needs to pay their fair share of everything, so that a waiver of fees is neither politically appropriate or necessary as a matter of public policy. Edmonds wants to do all it can to incentivize the installation of renewable energy projects, and the Planning Department's current approach to permitting fees is a small but successful step toward attaining that goal.

Councilmember Fraley-Monillas asked about the ongoing statewide ESSP fee standardizing efforts. Mr. Yarberry answered it is part of DOE's SunShot Initiative; different elements of solar have been

distributed to different groups around the county. The ESSP is studying a standardized permitting process. Because this is new technology, many jurisdictions do not have a permitting process to address it. The ESSP will likely make a recommendation regarding fees, but each jurisdiction will establish its own fees.

Councilmember Buckshnis pointed out without a permit, the City would not know how many residences have solar systems. She supported lowering the permit fee to provide incentive for solar installations. She asked about Exhibit 1 in the packet, Community Solar Fee Comparison. Mr. Yarberry advised the numbers were provided by Mr. Bernheim and were used by staff to calculate a baseline fee for Phase 1 of the Frances Anderson Center project.

Councilmember Johnson suggested evaluating the amount of time spent on plan review and inspection in determining the fee for a commercial solar installation.

Council President Peterson observed if the Council took no action, staff would continue with the fee structure for residential installations as described. Mr. Yarberry agreed. Council President Peterson observed waiving fees would require Council action. Mr. Yarberry agreed.

Council President Peterson disclosed he owns a slice of the solar installation on the Frances Anderson Center and has promised to donate any profits from it to Sustainable Edmonds.

The Council took no action with regard to this item.

#### **7. DISCUSSION REGARDING TAKING MINUTES/NOTES DURING EXECUTIVE SESSIONS.**

Council President Peterson explained the Council began discussing the taking of minutes/notes during executive sessions at the 2012 Council retreat. Upon further Council and Committee direction, he was asked to schedule a broader discussion along with presentations from outside interested parties.

**Jim Doherty, Legal Consultant, Municipal Research Service Center (MRSC)**, explained MRSC has functioned in Washington for over 75 years as an advisory group to cities, counties and special purpose districts on a wide range of issues. MRSC has 25 staff members including 6 attorneys, 2 planners, a finance consultant, policy consultants and has the most extensive local government library in the State. MRSC's website, [www.MRSC.org](http://www.MRSC.org), is open to the public. He has been with MRSC for over 19 years and authors and updates the Public Records Act (PRA) publication as well as has addressed many questions over the years regarding Open Public Meetings Act (OPMA) issues.

Mr. Doherty relayed he had reviewed Council minutes where the issue of taking minutes/notes during executive session had been discussed and City Attorney Taraday's input regarding the pattern in Washington cities. He was also provided an email from Ken Reidy that contained a blog post and responses regarding this issue.

Mr. Doherty relayed MRSC is not aware of any cities in the State of Washington that take minutes of executive sessions or record executive sessions. He found a reference that was confirmed by Mr. Nixon that the Port of Seattle records their executive sessions because of scrutiny by the State Auditor's Office due to past problems. MRSC's advice to cities over the last 20 years is that cities not take minutes of executive sessions. He clarified it was not that MRSC was for or against open government, as a practical matter there is some uncertainty regarding the status of minutes of executive sessions because they usually are not taken; there is no specific exemption in the PRA for minutes of executive sessions. MRSC's position is cautious; their advice is why create a problem that cities do not need.

Mr. Doherty explained the purpose of minutes is an official record of action taken by the Council. Executive sessions are discussion and not final action; any action is taken during open session. Thus the purpose of minutes of an executive session is not clear because no action is taken.

Councilmember Buckshnis expressed her appreciation for the work MRSC does for city officials, recalling she utilized their resources regarding financial transparency. She asked about taking notes of executive session rather than minutes. Mr. Doherty asked who would take the notes. If a Councilmember takes notes in executive session for their own use, they are similar to notes taken during an open Council meeting. There is case law that supports the view that those are not public records, they are a Councilmember's own personal notes, not taken at the request of the City, and not used by the City. He cited *Jacobellis v. Bellingham* where the court found personal notes are not a public record.

Councilmember Buckshnis asked about notes taken by the City Clerk. Mr. Doherty answered if those notes are minutes, a record of the executive session, under one statute they are not open to public inspection. He noted it is unclear as the statute was written long before the PRA was adopted.

Councilmember Petso asked about the statute that distinguishes Clerk's notes from a public record. Mr. Doherty answered RCW 42.32.030 which was passed in 1953 and has never been amended.

Councilmember Johnson observed one question is whether a written record should be kept of executive sessions. She asked what should be done with the records maintained of executive sessions over the past seven years if the Council decided to stop keeping a written record; should they be destroyed or were they subject to public record requests. Mr. Doherty answered their destruction would depend on how the records retention schedule applied to those records. The retention schedule for minutes of regular Council meeting minutes requires they be kept permanently. He was uncertain whether that would apply to notes of an executive session. With regard to public records requests for those notes, he referred the Council to the City Attorney. He recognized many of the notes are related to attorney-client privilege where exemptions clearly apply.

Councilmember Johnson commented if the Council chose to stop taking minutes of executive sessions, the Council could audio record executive sessions. She asked whether Mr. Doherty knew of any other cities, other than the Port of Seattle, that audio record their executive sessions. Mr. Doherty answered he did not. He pointed out there is no exemption that applies to an audio recording, whether video or voice, and if no exemption applies, it must be disclosed. If the City made an audio recording of an executive session and someone requested it, the City would need to provide it. That could be problematic if the Council was discussing a real estate purchase or other sensitive issues. Councilmember Johnson commented she had not heard that before; it was a key point. Mr. Doherty commented there was legislation pending this year and in past years regarding recording of executive sessions but it included a provision that any challenge would require a judge review the recording in chambers and exemptions would apply. That legislation did not pass and there is currently no exemption in the law for a recording of an executive session. Unless that is clarified, he recommended cities not record executive sessions.

Councilmember Johnson asked whether any legislation regarding recording of executive sessions was anticipated in the next legislative session. Mr. Doherty answered that was difficult to anticipate; it has been raised in the past and has not been passed. It may be introduced again as the Coalition for Open Government and other groups believe it is an important issue.

Councilmember Johnson summarized Mr. Doherty's recommendation was that the City do not maintain written records or audio recordings of executive sessions and whatever records of executive sessions the City has created would be maintained in accordance with the records retention schedule. Mr. Doherty agreed with her summary.

**Toby Nixon, President, Washington Coalition for Open Government (WCOG)**, explained he is a former member of the State Legislature, served as ranking member on a Committee of the House that had responsibility for the open government laws of Washington, and is currently a City of Kirkland Councilmember, elected in November 2011.

Mr. Nixon commented this has been one of WCOG's highest priority issues for several years. WCOG is a statewide non-profit, non-partisan organization dedicated to defending and extending the people's right to know what their government is doing. WCOG focuses most of its energy on the PRA and OPMA but also works on open courts, open legislative process, open rule-making processes, follows the workings of the Public Disclosure Commission, disclosure of campaign finance and lobbyist information, whistle-blower laws, ethics laws, and anything related to transparency and accountability in government. This is accomplished via four programs: education, litigation, legislation and recognition.

He relayed language from RCW 42.30.010, "The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly. The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

Mr. Nixon provided a definition of executive session: "Executive sessions are meetings allowed (but not required) to be closed to the public because the people, through their legislative representatives, have determined that it is more in the public interest than not that the specific information to be discussed be kept secret for some period of time."

To the question of whether recordings should be made, Mr. Nixon said yes. Agencies can choose today to make audio or video recordings, or to keep notes or minutes, of executive sessions. There is no prohibition of such recordings. Recordings can be useful for a number of agency purposes:

- To resolve disagreements over what transpired or was said
- To hold attorneys and others accountable for advice given or information provided in closed meetings
- To allow newly-appointed or newly-elected members of the body to catch up on previous executive session discussions
- To improve the ability of the agency to defend itself if it is accused of having an inappropriate discussion in an executive session

Mr. Nixon relayed reasons some many do not want executive sessions recorded:

- Would interfere with frank, honest, free-flowing conversations. He emphasized that is the point, executive sessions should be limited to only the allowed topic and nothing more. Members should not need to be behind closed doors to have a frank and honest discussion.
- Recording is expensive. He cited the reasonable cost of a digital audio recorder. Operation is trivial. The recorder can be plugged into a PC via USB cable and recordings transferred to a secure server, and be as well protected as any other confidential electronic city records. No need for expensive safes, locked file cabinets, or large amounts of storage space.
- Risk of disclosure under the Public Records Act. Mr. Nixon relayed information from RCW 42.56.010 Definitions, of "public record" and "writing," agreeing that audio recordings are records, including voicemails. He acknowledged recordings are not automatically exempt. Recordings of several of the allowed topics for executive sessions would be exempt from disclosure, but not all.

Mr. Nixon explained the Port of Seattle Digitally records all executive sessions. They submit records to outside counsel for periodic review for compliance. They have not had many requests for disclosure although who knows what will happen with current controversy.

Mr. Nixon described the allowable topics for executive session (RCW 42.30.110) and his response to each (in italics):

- (a) To consider matters affecting national security.  
*Rarely applies to cities. Some topics covered under 42.56.420 (security plans and vulnerabilities, prevention of terrorist acts).*
- (b) To consider the selection of a site or the acquisition of real estate by lease or purchase when public knowledge regarding such consideration would cause a likelihood of increased price.
- (c) To consider the minimum price at which real estate will be offered for sale or lease when public knowledge regarding such consideration would cause a likelihood of decreased price. However, final action selling or leasing public property shall be taken in a meeting open to the public.  
*Real estate appraisals are covered by 42.56.260, but not discussion of price willing to pay or sell for, or the fact that the city is interested in the property.*
- (d) To review negotiations on the performance of publicly bid contracts when public knowledge regarding such consideration would cause a likelihood of increased costs.  
*Not covered by any known PRA exemption.*
- (f) To receive and evaluate complaints or charges brought against a public officer or employee. However, upon the request of such officer or employee, a public hearing or a meeting open to the public shall be conducted upon such complaint or charge.  
*Records of complaints against public employees are disclosable unless determined to be unsubstantiated or false. 42.56.230(3), Bellevue John Does v. Bellevue School District. Some records may be exempt under the investigatory records exemption, 42.56.240(1). Identity of persons filing complaints may be exempt under 42.56.240(2) if their life, safety, or property may be endangered by disclosure, and they request non-disclosure.*
- (g) To evaluate the qualifications of an applicant for public employment or to review the performance of a public employee. However, subject to RCW 42.30.140(4), discussion by a governing body of salaries, wages, and other conditions of employment to be generally applied within the agency shall occur in a meeting open to the public, and when a governing body elects to take final action hiring, setting the salary of an individual employee or class of employees, or discharging or disciplining an employee, that action shall be taken in a meeting open to the public;  
*Names, resumes, other application materials are exempt from disclosure under 42.56.250(2). No exemption for other content of discussion.*
- (h) To evaluate the qualifications of a candidate for appointment to elective office. However, any interview of such candidate and final action appointing a candidate to elective office shall be in a meeting open to the public;  
*Not exempt under PRA.*
- (i) To discuss with legal counsel representing the agency matters relating to agency enforcement actions, or to discuss with legal counsel representing the agency litigation or potential litigation to which the agency, the governing body, or a member acting in an official capacity is, or is likely to become, a party, when public knowledge regarding the discussion is likely to result in an adverse legal or financial consequence to the agency.  
*All materials are likely exempt under RCW 42.56.290 or 5.60.060(2)(a), which are broader than the allowed purposes for executive sessions for attorney-client communication, and include all "attorney work product".*

Topics for executive session not applicable to cities include:

- (e) ...export trading company...;
- (j) ...state library...;



- (k) ...state investment board...;
- (l) ...state purchased health care services...;
- (m) ...life sciences discovery fund authority...;
- (n) ...health sciences and services authority...;
- (o) ...innovate Washington...

Mr. Nixon referred to RCW 42.30.140 that describes meetings that are not technically “executive sessions,” in that they do not require the agency to first convene in an announced public meeting, declare the purpose and duration of the closed meeting, and then return to public session to adjourn. He explained “140” meetings can be entirely secret, although many agencies treat them the same as “110” executive sessions. Mr. Nixon reviewed the four types of meetings described in RCW 42.30.140 and his response to each (in italics):

- (1) The proceedings concerned with the formal issuance of an order granting, suspending, revoking, or denying any license, permit, or certificate to engage in any business, occupation, or profession or to any disciplinary proceedings involving a member of such business, occupation, or profession, or to receive a license for a sports activity or to operate any mechanical device or motor vehicle where a license or registration is necessary; or  
*Business license proceedings occur in cities, but are not exempt under the PRA.*
- (2) That portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group; or  
*Cities have quasi-judicial discussions for permitting, etc. Not exempt under the PRA.*
- (3) Matters governed by chapter 34.05 RCW, the Administrative Procedure Act; or  
*Does not apply to cities.*
- (4)(a) Collective bargaining sessions with employee organizations, including contract negotiations, grievance meetings, and discussions relating to the interpretation or application of a labor agreement; or (b) that portion of a meeting during which the governing body is planning or adopting the strategy or position to be taken by the governing body during the course of any collective bargaining, professional negotiations, or grievance or mediation proceedings, or reviewing the proposals made in the negotiations or proceedings while in progress.  
*Information regarding unfair practices exempt under 42.56.250(4) and (5). Otherwise, not exempt under PRA.*

Mr. Nixon relayed WCOG’s support for enactment of additional PRA exemptions:

- Specific public records exemptions to cover each of the executive session topics, even if the material is discussed in writing rather than in an executive session.
- Blanket public records exemption for all recordings, minutes, and notes of executive sessions. This would also cover materials prepared by staff for review during executive sessions. Materials provided in executive session today are not exempt from disclosure under the PRA unless communications from the City Attorney protected by attorney-client privilege.

In the meantime, WCOG recommends Council’s be selective; have a policy to not record executive sessions when the discussion would not be exempt from the PRA, or retain only a high-level summary of the nature of the discussion without the key details. They recommend cities consider the benefits of recordings or notes on key topics that would be exempt from disclosure. For example because there is a broad exemption for attorney-client privilege communications and since attorney-client communications are the most frequent purpose for executive sessions, the Council may decide to record those executive sessions.

Mr. Nixon provided WCOG’s contact information: Washington Coalition for Open Government, 6351 Seaview Avenue NW, Seattle, WA 98107; (206) 782-0393; [info@washingtoncog.org](mailto:info@washingtoncog.org); [www.washingtoncog.org](http://www.washingtoncog.org).

Councilmember Fraley-Monillas asked why no cities in the State kept minutes or record executive sessions. Mr. Nixon answered it is due to the concern about possible disclosure if a member of the public submitted a properly worded public records request. Councilmember Fraley-Monillas asked whether Kirkland keeps minutes or records executive sessions. Mr. Nixon answered Kirkland does not.

Councilmember Fraley-Monillas asked why Councils have executive sessions. Mr. Nixon answered it was because the legislature decided it was more in the public interest than not to have that discussion in secret and to keep the content secret for at least some period of time. For example if the Council were to discuss the most they were willing to pay for property and that information became public and known to the property owners, that would become the price of the property and the City's ability to negotiate a lower price would be extremely limited.

Councilmember Fraley-Monillas asked about executive session for labor negotiations. Mr. Nixon responded when he was in the legislature, he advocated for removing labor negotiations as an allowed topic for executive session; he personally believes labor negotiations should occur in public as they do in many other states.

Councilmember Buckshnis asked if one of the legislature's responsibilities was to be risk managers. Mr. Nixon answered one would hope they had that exposure in mind when they passed bills. In his experience, that did not always happen because the analysis has not been deep enough. Councilmember Buckshnis asked as risk managers, shouldn't the goal be to prevent litigation; recordings of executive session could expose Councilmembers and the City to liability. Mr. Nixon answered it was unlikely to expose Councilmembers individually. There could be scenarios for liability based on the content of the recording such as inappropriate statements or incorrect information made in executive session that could be considered libel. His focus was the purpose of the executive session; attorney-client privilege is obvious, the Council does not want to expose its courtroom strategy to the opposition in a lawsuit.

Councilmember Buckshnis commented if executive sessions were recorded, Councilmembers would need to be more careful about what they said. Mr. Nixon answered that was a good thing; people in leadership positions should think carefully before they speak. As a Councilmember himself, before saying or emailing anything, he assumes it will be printed on the front page of the Seattle Times the next day.

Councilmember Buckshnis commented she did not object to disclosing information discussed in executive sessions regarding real estate once the transaction had been completed. She recognized confidentiality must be maintained for some other topics. Mr. Nixon referred to the fundamental principles of the PRA and OPMA, the people are sovereign, they have a right to know what their government is doing, and it is up to them to decide what is good for them to know, not for elected officials to decide what is good for them to know.

Rather than determining what topics were exempt from the PRA, Councilmember Yamamoto suggested it would be simpler not to record executive sessions. He suggested that was why no other cities recorded executive sessions. Mr. Nixon agreed without a blanket exemption for recordings of executive sessions, cities are unwilling to determine what executive session topics should and should not be recorded. If the idea of recording executive sessions for its own use is something the Edmonds City Council would like, he urged them to request that AWC support legislation that would allow it.

Councilmember Yamamoto referred to Mr. Nixon's comment about handouts provided during executive sessions. Mr. Nixon explained if a document is produced by City staff and distributed in executive session, it does not become a protected document because it was viewed in executive session. It is a public record like any other City document. Unless there is an exemption covering the content of the document, it must be released if a member of the public requested it. Councilmember Yamamoto asked what documents would be protected. Mr. Nixon answered it would depend on the nature of the document;

a memo from the attorney regarding a case and strategies would be exempt from disclosure. Other documents may not be exempt. For example in the case of real estate, there is an exemption in the PRA for an appraisal but there is no exemption for other types of information such as a staff analysis of the property, how a facility would fit on the property, etc., unless it was protected by the generic deliberative process exemption. Simply collecting documents distributed in executive session and shredding them is not enough; the original is still on someone's computer and required to be retained under the records retention schedule. If a member of the public requested it, the City Attorney would need to determine how to prevent its disclosure.

Councilmember Yamamoto summarized his understanding was that every document and handout provided at executive session should be processed accordingly. Mr. Nixon answered similar to any document handled by the Council in its official role it is considered a public record and unless a specific exemption applies, someone could request it. Councilmember Yamamoto asked Mr. Doherty's opinion. Mr. Doherty agreed with Mr. Nixon's statement; just because something is looked at in executive session does not create an automatic exemption for it.

Councilmember Yamamoto asked whether comparisons provided by staff in executive session regarding labor negotiations would be subject to a public records request. Mr. Nixon answered he was not aware of any exemption for that. Mr. Doherty referred to a case, *ACLU v. Seattle*, where strategy papers reviewed in executive session were not exempt under the PRA.

Councilmember Yamamoto asked whether the attorney should check everything that staff provided prior to an executive session. City Attorney Jeff Taraday pointed out it was not sufficient for him to check something; it would need to be advice from him in order to be attorney-client privilege exempt. It was not enough for a director to have the City Attorney review it for it to become attorney-client privilege exempt. Mr. Nixon agreed having the City Attorney in the room does not make a conversation attorney-client privilege nor does the City Attorney reading a document make it attorney-client privilege. Mr. Nixon suggested the Council could ask the City Attorney whether a document would be exempt from disclosure.

Councilmember Bloom recalled Mr. Nixon said the Council could choose to record some executive sessions. If the Council made a decision to record all executive sessions regarding attorney-client privilege, would they be exempt from disclosure under the PRA? Mr. Nixon answered yes, as long as the executive session followed the guidelines in the OPMA.

Councilmember Bloom asked whether those recordings would be exempt forever from public disclosure? Mr. Nixon answered according to a Supreme Court decision, there is no timeout on attorney-client communication, particularly related to litigation. Even though one lawsuit completes, there is nothing to stop someone else from suing on a similar topic; therefore, privileged information should not be released and benefit the next person filing a lawsuit.

Councilmember Bloom asked for clarification whether notes taken by the City Clerk or any record kept of executive sessions related to attorney-client privilege would be subject to public disclosure. Mr. Nixon answered the portion of the notes related to questions asked of the attorney and the attorney's responses could be redacted. Anything else would be disclosable. Councilmember Bloom asked who made the decision regarding what was exempt and what was not if a public records request was submitted. Mr. Nixon answered the Public Records Officer; if he/she had any questions, he/she would seek direction from the City Attorney. Ultimately the State Supreme Court decides what is exempt or not exempt. Even if staff makes a decision they believe is correct with regard to disclosure, someone could still sue the City.

Councilmember Bloom commented Edmonds is in the unique position of having taken summary minutes of executive sessions for several years in accordance with direction provided by resolution. She commented it would be difficult to go backward when that practice was started for a legitimate reason.

There was also discussion at a Council meeting that certain executive session meetings could be disclosed when the issue was resolved. She questioned how the City should proceed when it was “already more advanced in some ways in terms of open government than other cities are.” Mr. Nixon answered according to the law, if someone made a public records request for them, the non-exempt portions would need to be disclosed. If they meet the legal definition of minutes, they must be retained forever. If they are only notes, their retention is determined by the records retention schedule.

Councilmember Johnson referred to the question she asked previously, should the City maintain a paper record; if the answer is yes, it is important to know the retention schedule. Although the ordinance refers to them as minutes, the City Attorney has advised they do not meet the legal definition of minutes because they are not voted upon and are actually notes kept by the City Clerk. Given the current laws, she asked for Mr. Nixon’s recommendation whether a paper record should be kept. Mr. Nixon clarified under the PRA, all types of records are the same, whether paper, electronic or an audio recording, the content of the record is what is important. It is easier to redact paper records. With regard to a recommendation, he has not loudly demanded that Kirkland start recording executive sessions because he recognizes the value of their being exempt. He has encouraged Kirkland to urge AWC not to oppose legislation regarding executive sessions.

Councilmember Johnson relayed her understanding that it made a difference who took the notes. She asked if an audio recording or notes taken by the City Attorney would be exempt. Mr. Nixon answered it would depend whether it was an attorney-client privileged discussion. The City Attorney’s record of questions asked and responses he gave would be exempt as an attorney-client work product. If the City Attorney was simply being used as a clerk to take notes about something other than an attorney-client privilege discussion, the fact that he was the City Attorney would make no difference with regard to whether the notes were disclosable.

Councilmember Johnson relayed her understanding that there was no exemption for audio recordings other than regarding an assessed valuation of a real estate transaction and would need to be made available upon a public records request. Mr. Nixon answered audio recordings are included in the definition of public records. Whether a recording was disclosable would depend on the content of the recording; portions of the recording for which there is an exemption could be redacted, the rest of the recording would have to be disclosed.

With regard to minutes versus notes, Council President Peterson asked if there could be such a thing as executive session minutes when the Council did not vote on the minutes in executive session or in public session. And if they are just cursory notes that are not reviewed by the Council, who outside the City Clerk has the ability to verify their authenticity/accuracy if they become a public record upon a public records request. Mr. Nixon answered that is why the Port of Seattle is recording their executive sessions. He asked if the executive session minutes/notes the City currently maintains are distributed to Council following executive session. Council President Peterson answered they are not. Mr. Nixon agreed the Council was very dependent upon the accuracy of the person taking notes during executive session. If there were a dispute in the future regarding an executive session, he envisioned a judge and jury would ultimately make a decision regarding the accuracy of the record. Council President Peterson summarized the Council was in a very nebulous situation with any kind of recording device, whether pen or audio recording.

Mr. Nixon clarified he is not an attorney and urged the Council not to act on anything he said without first checking with the City Attorney.

Councilmember Petso asked how confident Mr. Nixon was in his statement that a Councilmember’s personal notes made in executive session were not a public record. Mr. Nixon answered that was established in the case *Jacobellis v. Bellingham* which is summarized on the MRSC website. As long as a

Councilmember does not share their notes with others, it is a personal record and not a City record. Councilmember Petso asked whether that applied to notes typed into her city-provided iPad. Mr. Nixon answered yes; he sends emails to himself and was told by Kirkland's City Attorney that emails he sends to himself as personal notes and not shared with anyone else were exempt from disclosure. If the emails are forwarded to someone else, they become a public record. Mr. Taraday stated he was unsure about that interpretation.

Council President Peterson asked for Council direction regarding recording executive sessions.

Councilmember Fraley-Monillas preferred to wait to see what action the legislature took.

**COUNCILMEMBER BUCKSHNIS MOVED, SECONDED BY COUNCILMEMBER YAMAMOTO, TO RESCIND RESOLUTION 853 BECAUSE MINUTES ARE IN FACT NOT BEING TAKEN.**

Councilmember Petso pointed out this was listed on the agenda as a discussion item. She preferred to rescind the resolution at a future meeting when the item is on the agenda for action.

Councilmember Bloom agreed with Councilmember Petso. She suggested holding a public hearing.

Councilmember Petso suggested the Council consider keeping a record of attorney-client privileged discussions as they would be exempt under the PRA.

**COUNCILMEMBER BUCKSHNIS WITHDREW HER MOTION WITH THE AGREEMENT OF THE SECOND.**

Council President Peterson asked whether this issue should go back through the committee process.

Councilmember Bloom commented it would be prudent to have it discussed at committee as Councilmember Johnson was not on the Committee at that time and new information has been provided that warrants further discussion.

Council President Peterson explained the purpose of committee discussion was so staff could update the committee. There is no City staff person in that role for this item. He did not want it to be a discussion between two Councilmembers and members of the public that excluded the other five Councilmembers. He preferred any further discussion occur at a regular Council meeting.

Councilmember Fraley-Monillas commented discussions at committee should only be with the two Councilmembers on the committee; the public is not included in discussion other than by providing input during public comment.

Councilmember Bloom asked whether the City Attorney can participate at the committee level. The discussion at committee could include attorney-client privilege, recording, which executive sessions could be recorded, etc. Mr. Taraday responded he is happy to attend a committee meeting if there is meaningful discussion he needs to participate in. His advice on this matter is straight-forward and remains the same. The vast majority of executive sessions are attorney-client privileged. Any recording of executive sessions regarding potential litigation is in all likelihood protected under the PRA and it is up to the City Council to decide whether to record those. With regard to other types of executive sessions, they should not be recorded because there is no clear exemption from disclosure. He summarized it is an administrative, logistical question; whether the City wants to deal with the hassle of turning on and off a recording device or having the City Clerk enter and leave the room for the portion of the executive session the Council wants a written record maintained. He was unsure he needed to attend the committee

meeting to have that discussion. The presentations by Mr. Doherty and Mr. Nixon were excellent; he would broaden what Mr. Nixon said would be included under the potential litigation exemption.

Councilmember Yamamoto commented this was a work session and presentations were made by two parties. He was unclear what sending it to committee would accomplish. He preferred the full Council participate in any further discussions.

For Council President Peterson, Councilmember Johnson said she was present when the committee last discussed this matter. Council President Peterson asked whether Councilmember Johnson preferred to have it discussed at committee. Councilmember Johnson suggested the committee could discuss it at the September 11 meeting and it could be scheduled for full Council discussion on September 18. She was uncertain Councilmember Bloom and she were of like minds but they could narrow the issues to facilitate Council discussion.

Council President Peterson concluded since both committee members asked for this issue to be scheduled, he will schedule it on the September 11 Committee agenda. He echoed Councilmember Fraley-Monillas' comments that committee meetings are not open discussions with the public. He will discuss with Mr. Taraday whether his presence at the committee meeting is necessary.

Councilmember Johnson requested staff determine the records retention for notes.

#### **8. REPORT ON OUTSIDE COMMITTEE/BOARD MEETINGS**

Councilmember Yamamoto reported SnoCom is working to resolve issues with the New World system. The Port of Edmonds is in the process of presenting the Harbor Square Master Plan to the Planning Board. The Citizens Technology Advisory Committee (CTAC) did not meet this month.

Councilmember Fraley-Monillas reported the Snohomish County Health District Program Policy Committee discussed fluoride in the water and agreed to send the matter to the full Board with a recommendation not to change the current policy regarding fluoride in water. The Committee has requested that testimony be limited to recent data and not old data from the 1950s and 1960s.

Councilmember Buckshnis reported WRIA 8 is having a Cedar River Watershed event. She reported Governor Gregoire gave each Snohomish County Tomorrow (SCT) member a merit award for intergovernmental collaboration in the preparation of the Countywide Planning Policies. SCT is also discussing dispute resolution for municipal urban growth areas (MUGA).

Council President Peterson reported the Council will be provided an update on the Regional Fire Authority (RFA) discussion at the September 18 meeting. Mayor Earling, Councilmember Petso and he participate on the planning committee as well as individual subcommittees.

Mayor Earling requested Council President Peterson and Councilmember Petso meet with him after the meeting regarding the RFA.

Councilmember Bloom reported staff provided updates to the Economic Development Commission regarding Highway 99, the Harbor Square Master Plan, Main Street project, etc. Evan Pierce and Bruce Witenberg were elected co-chairs.

Councilmember Johnson reported there will be a formal dedication of the Allen House on the Edmonds Register of Historic Places on August 29 at 3:00 p.m.

Mayor Earling reported in the next few weeks, the Sound Transit Board will begin discussions regarding elements of Sound Transit 3 which in theory will launch an extension from Lynnwood to Everett.

**9. MAYOR'S COMMENTS**

Mayor Earling announced the September 4 Council meeting has been cancelled.

**10. COUNCIL COMMENTS**

Councilmember Bloom reported she has attended the Planning Board meetings regarding the Harbor Square Master Plan. The Planning Board is doing an exceptional job reviewing the Master Plan. She encouraged the public to watch the video that airs daily at 8:00 a.m. on Channels 21 and 39.

Councilmember Buckshtis invited the public to the Puget Sound Bird Fest on September 7 – 9. It starts at the Edmonds Wildlife Habitat Native Plant Demonstration Garden and includes viewing of birds in the marsh. She next thanked several of her neighbors who assisted her and her husband with their fourth annual block party. She explained anyone living on a non-essential street can obtain a special event permit for a block party.

Councilmember Fraley-Monillas reported she led this year's last senior center walk. It was a successful summer and great deal of fun.

Councilmember Yamamoto reported the Chamber golf tournament at the White Horse in Kingston was well attended.

**11. ADJOURN**

With no further business, the Council meeting was adjourned at 9:37 p.m.